KETUA POLIS NEGARA

v.

ABDUL GHANI HAROON & ANOTHER APPLICATION

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
HAIDAR MOHD NOOR FCJ
[CRIMINAL APPLICATION NOS: 07-1-2001(B) & 07-2-2001(B)]
6 AUGUST 2001

CONSTITUTIONAL LAW: *Fundamental liberties - Preventive detention - Right of detained person - Whether detained person has right to be present at habeas corpus proceedings - Whether preventive detention similar to criminal proceedings - Federal Constitution, art. 5(2) - Internal Security Act 1960, s. 8 - Internal Security (Detained Persons) Rules 1960, r. 93*

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Right to appear in court for hearing of application - Whether a constitutional right - Whether there are compelling reasons to produce detainee in court - Federal Constitution, art. 5(1), (2) - Internal Security Act 1960, s. 8 - Internal Security (Detained Persons) Rules 1960, r. 93*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus, application for - Whether a constitutional right - Right to appear in court for hearing of application - Whether a constitutional right - Whether there are compelling reasons to produce detainee in court - Federal Constitution, art. 5(1), (2) - Internal Security Act 1960, s. 8 - Internal Security (Detained Persons) Rules 1960, r. 93*

The applicants are officers of a political party, Parti Keadilan Nasional. They were arrested separately on 10 April and 11 April 2001 under s. 73(1) of the Internal Security Act 1960 ('ISA'). The issue that arose for decision on appeal here was whether the learned judge was right in ruling that the applicants had a constitutional right to be present at the hearing of their *habeas corpus* applications wherein he ordered for their production in court.

Held:
Per Haidar Mohd Noor FCJ

[1] The construction to be given to art. 5(2) of the Federal Constitution will have to be interpreted and applied according to the wording of the Federal Constitution as a whole and to find its meaning by legal reasoning. The wordings in art. 5(2) of the Federal Constitution, given

their natural and ordinary meaning, seem to show clearly that the High Court or any judge shall order a detainee to be produced in court and release him **after** being satisfied that the detention is unlawful. In other words, art. 5(2) of the Federal Constitution does not envisage the production of a detainee at the hearing of his *habeas corpus* application.

[2] The ISA is a legislation essentially to prevent and combat subversion and actions prejudicial to public order and national security. A detention under the ISA is a preventive detention where a person is detained without trial. Criminal proceedings and preventive detention are not parallel proceedings. The object of a criminal prosecution is to punish a person for an offence committed by him, while a preventive detention is an anticipatory measure and may not relate to an offence. Hence the constitutional right to be present in *habeas corpus* proceedings is a limited one.

[3] Taking into account s. 8 of the ISA and r. 93 of the Internal Security (Detained Persons) Rules 1960, the right of a detained person to be present at his *habeas corpus* proceedings is not a constitutional right but is at the discretion of the court. On the facts, even if the learned judge were minded to exercise his judicial discretion for the production of the applicants, there was no sufficient material before him to exercise such a discretion.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pemohon-pemohon adalah pegawai-pegawai sebuah parti politik, Parti Keadilan Nasional. Mereka telah ditahan secara berasingan pada 10 April dan 11 April 2001 di bawah s. 73(1) Akta Keselamatan Dalam Negeri 1960 ('ISA'). Isu yang berbangkit adalah samada hakim yang bijaksana betul dalam memutuskan bahawa pemohon-pemohon mempunyai hak perlembagaan untuk hadir di perbicaraan permohonan *habeas corpus* mereka di mana beliau telah memerintahkan supaya mereka dikemukakan dalam mahkamah.

Diputuskan:
Oleh Haidar Mohd Noor HMP

[1] Pembentukan yang harus diberikan kepada art. 5(2) Perlembagaan Persekutuan terpaksa ditafsirkan dan dipakai menurut perkataan Perlembagaan tersebut secara keseluruhannya dan mencari maksudnya menurut alasan undang-undang. Perkataan dalam art. 5(2), bergantung

pada maksudnya yang biasa dan asal, nampaknya menunjukkan dengan jelas bahawa Mahkamah Tinggi atau mana-mana hakim akan memerintah supaya seorang tahanan dikemukakan dalam mahkamah dan melepaskannya setelah berpuashati bahawa penahanan tersebut adalah tidak sah di sisi undang-undang. Dalam ertikata lain, art. 5(2) tidak membayangkan pengemukaan seorang tahanan di perbicaraan *habeas corpus* beliau.

[2] Akta Keselamatan Dalam Negeri 1960 adalah satu perundangan yang secara asasnya adalah untuk mencegah dan membenteras kegiatan subversi dan tindakan-tindakan yang prejudis kepada ketenteram awam dan keselamatan negara. Penahanan di bawah ISA adalah penahanan pencegahan di mana seseorang ditahan tanpa perbicaraan. Prosiding jenayah dan penahanan pencegahan bukannya prosiding selari. Matlamat pendakwaan jenayah ialah untuk menghukum seseorang atas sesuatu kesalahan yang dilakukannya, sementara penahanan pencegahan pula adalah langkah dalam jangkaan dan mungkin tidak berkaitan dengan sesuatu kesalahan. Oleh itu hak perlembagaan untuk hadir dalam prosiding *habeas corpus* adalah hak yang terhad.

[3] Mengambilkira s. 8 ISA dan k. 93 Kaedah-Kaedah Keselamatan Dalam Negeri (Orang Yang Ditahan) 1960 hak orang yang ditahan untuk hadir dalam prosiding *habeas corpus* bukannya hak berperlembagaan tetapi adalah atas budibicara mahkamah. Berdasarkan fakta-fakta tersebut, meskipun jika hakim yang bijaksana bermaksud untuk melaksanakan budibicara kehakimannya bagi pengemukaan pemohon-pemohon tersebut, tidak terdapat bahan yang mencukupi di hadapan beliau untuk melaksanakan budibicara yang sedemikian.

[Rayuan dibenarkan.]

Case(s) referred to:

Attorney General of the Commonwealth, ex relatione Mc Kinley v. The Commonwealth of Australia [1975] 135 CLR I ***(refd)***

Dewan Undangan Negeri Kelantan v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 ***(refd)***

Kanu Sanyal v. District Magistrate, Darjeeling & Ors AIR [1973] SC 2684 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***

Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v. Lim Guan Eng [1989] 1 CLJ 906; [1989] 1 CLJ (Rep) 102 ***(refd)***

Minister of Home Affairs v. Fisher [1980] AC 319 ***(refd)***

Minister of Home Affairs & Anor v. Karpal Singh (No 2) [1988] 3 MLJ 85 ***(foll)***

Re Tan Sri Raja Khalid Raja Harun [1988] 1 MLJ 182 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 365(a), 366, 367, 374
Federal Constitution, arts. 5(2), (4), 149
Internal Security Act 1960, ss. 8, 73(1)
Internal Security (Detained Persons) Rules 1960, r. 93(1)

Other source(s) referred to:
DD Basu, Shorter Constitution of India, 12th edn, 1999, p 187

For the appellant - Abdul Gani Patail SFC (Mohd Yusof Hj Zainal Abidin & Abd Karim Abd Jalil)

For the respondents - Hj Sulaiman Abdullah (R Sivarasa, Malik Imtiaz Sarwar, Kamarul Hisham Kamaruddin & P Kandasamy); M/s Selvam Shanmugam & Partners

Reported by Mariette Peters-Goh

JUDGMENT

Haidar Mohd Noor FCJ:

The issue in this appeal is whether the learned judge at the High Court, Shah Alam was right in ruling on 4 May 2001 that Abdul Ghani bin Haroon and Gobalakrishnan a/l Nagappan ("the applicants") had the constitutional right to be present at the hearing of their *habeas corpus* applications ("applications") *vide* Nos. 44-9-2001 and 44-10-2001 wherein he ordered for their production in court. The applications, by consent, were consolidated. The applications were supported by the affidavit of Puan Roslijah binti S. Syed, the wife of Abdul Ghani and the affidavit of Encik Deven a/l Nagappan, the brother of Gobalakrishnan. Ketua Polis Negara was cited as the respondent in their applications.

On 8 May 2001 an interim order of stay was granted by Abdul Malek Ahmad, FCJ, against the orders of the learned judge on the criminal applications filed by the respondent pending an appeal by the respondent to the Federal Court pursuant to s. 374 of the Criminal Procedure Code ("CPC").

When the two criminal applications came up for hearing on 14 May 2001, it was agreed by the parties to treat both criminal applications as appeals. We agreed and after hearing both parties, we reserved our decision. On 16 May 2001 we allowed the appeals of the respondent and set aside the orders of the learned judge. As intimated, we now proceed to give our reasons.

Brief Background

The applicants are officers of a political party, Parti Keadilan Nasional. They were arrested separately on 10 April 2001 and 11 April 2001 under s. 73(1) of the Internal Security Act 1960 ("ISA").

There was no formal application filed by the applicants for their presence at the hearing of their applications. The issue arose in this way.

According to the learned judge, the deputy registrar of the High Court caused to be issued and served on the respondent a "notice to produce" the applicants in respect of their *habeas corpus* proceedings. It is, it seems, the normal practice of the Shah Alam High Court in all *habeas corpus* proceedings. In this case the respondent did not comply with the order on the ground, according to the learned judge, that the respondent took the position that, in law, the applicants had no right to be present at the hearing of their applications. Unfortunately, the learned judge did not show or at least indicate the details of such cases of the practice of the Shah Alam High Court and there had been compliance thereof by the respondent previously. If there had been compliance by the respondent previously, then why in this particular case should the respondent take a different stand. We were therefore not clear on the so-called practice. Be that as it may, in this case, the applicants contended that they had the legal right to be present.

The learned judge took upon himself to decide the preliminary issue of whether, in law, the applicants have the legal right to be present at the hearing of their applications.

At the hearing of the appeal, the Senior Federal Counsel informed us that counsel for the applicants conceded that the order of the learned judge was appealable under s. 374 of the CPC. The concession by counsel could possibly be due to the judgment of the Supreme Court in *Minister of Home Affairs & Anor v. Karpal Singh (No. 2)* [1988] 3 MLJ 85 that the words 'decision or direction' under s. 374 of CPC must necessarily refer to the final decision or direction made under s. 365 of the CPC. Looking at the facts of the case, we were of the view that the interpretation of s. 374 of the CPC was decided *per incuriam* by the Supreme Court.

We proceeded to consider the preliminary issue decided by the learned judge.

Preliminary Issue

The learned judge in ordering the production of the applicants at the hearing of their applications relied on art. 5(2) of the Federal Constitution, which reads:

> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

The learned judge ruled that by virtue of art. 5(2) it is implicit that the right to apply to the High Court for a writ of *habeas corpus* is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained. It follows, according to the learned judge, that the right being a constitutional right, a detainee has every right to be present in court at the hearing of his *habeas corpus* application. He then posed the question – how else is a detained person to exercise his constitutional right under art. 5 cl. (2) to the fullest if he is prevented from attending the court hearing of his *habeas corpus* application?

The learned judge based his ruling on the principle of interpretation that should be adopted in interpreting constitutional provisions pertaining to fundamental rights citing the case of *Minister of Home Affairs v. Fisher* [1980] AC 319 as instructive. According to Lord Wilberforce, on behalf of the Privy Council, the Constitution of Bermuda which guaranteed fundamental rights and freedom should be given "a generous interpretation, avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental liberties referred to". The learned judge went on to state that the above principle was adopted by our Supreme Court in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh & Anor* [1992] 2 CLJ 1125 where Abdul Hamid Omar, LP, said at p. 1130:

> Secondly, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v. Fisher* [1980] AC 319 at p. 329, a constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used. ...

We agreed with what the learned judge stated as the approach to be adopted in interpreting the Constitution. In this context, it is also worth recalling what Barwick CJ of the High Court Australia said in *Attorney*

General of the Commonwealth, ex relatione Mc Kinley v. The Commonwealth of Australia [1975] 135 CLR I at p. 17:

> The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

It is pertinent to note the observation of Raja Azlan Shah, FJ (as His Highness then was) when considering the issue of whether the amendment to art. 5(4) of our Constitution was constitutional in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at p. 188 and 189:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' – see *Adegbenro v. Akintola and Anor* [1963] 3 All ER 544, 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

At the end of the day, the construction to be given to art. 5(2) will have to be interpreted and applied according to the wording of our Constitution as a whole and to find its meaning by legal reasoning.

Now, the wording in art. 5(2), given their natural and ordinary meaning, seem to show clearly that the High Court or any judge shall order a detainee to be produced in court and release him **after** being satisfied that the detention is unlawful. In other words, art. 5(2) does not envisage the production of a detainee at the hearing of his *habeas corpus* application. The Senior Federal Counsel took this approach in the interpretation of art. 5(2) before the learned judge but unfortunately the learned judge took scant regard to the wording of art. 5(2) and disagreed.

The learned judge ruled that a detainee has a constitutional right to be present in court for his *habeas corpus* application. However, the constitutional right will, in our view, have to be considered in the context of the relevant law applicable to a detainee. In this case the applicants were arrested under s. 73(1) of the ISA, a legislation enacted under art. 149 of the Constitution. "It is a legislation essentially to prevent and combat subversions and actions prejudicial to public order and national security. It is expressly provided in the Constitution that such a law as the Act is valid notwithstanding that it is inconsistent with art. 5, 9 or 10 of the Constitution dealing with fundamental liberties" per Salleh Abas, LP, in

Re Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 at p. 185. To that extent, therefore, the so-called constitutional right to be present in court in respect of *habeas corpus* proceedings challenging the arrest made under the ISA is a limited one.

We say so as the detention under the ISA is a preventive detention where a person is detained without trial. A criminal proceeding and preventive detention are not parallel proceedings. The object of a criminal prosecution is **to punish** a person for an offence committed by him, while a preventive detention is an anticipatory measure and may not relate to an offence (see p. 187 of *D.D. Basu's Shorter Constitution of India*, 12th edn 1999). Hence, the constitutional right to be present in *habeas corpus* proceedings is a limited one and the applicants here were not facing criminal charges.

While art. 5(2) provides the constitutional or substantive right, the CPC provides the procedure of enforcing such right. It is provided by way of Chapter XXXVI of the CPC under the caption "DIRECTIONS OF THE "NATURE OF A *HABEAS CORPUS*". Section 366 of the CPC provides for the application to be supported by way of affidavit. The affidavit can be made by the detained person or by some other person on his behalf (s. 367 of the CPC). As the proceedings are to be by way of affidavit evidence, it implies therefore that there would be no legal right for a detained person to be produced at the hearing of the *habeas corpus* proceeding unless an order for his release is to be made as clearly provided by art. 5(2) read with s. 365(a) of the CPC. In other words, no oral evidence is required in the *habeas corpus* proceeding and the issue of the detainee being prejudiced would not arise. He had the benefit of counsel. It is a matter for the detainee to show that the detaining authority has no legal power to detain him.

In the matter before us, the arrest of the applicants under s. 73(1) of the ISA is the prelude to an order under s. 8 of the ISA by the Minister. It is at the investigation stage. There would not be any possible punishment for an alleged offence in the court against the applicants.

We are here dealing with an arrest under s. 73(1) of the ISA and even in a challenge mounted against an order under s. 8 of the ISA, the Supreme Court in *Minister of Home Affairs, Malaysia & Anor v. Karpal Singh (No. 2)* [1988] 3 MLJ 85 in construing r. 93(1) of the Internal Security (Detained Persons) Rules 1960 stated at p. 86 thus:

> We are of the view that r. 93(1) on its proper construction, cannot be invoked to secure the presence of a detainee in any criminal or civil court notwithstanding that it is the detainee's choice to argue his own case. The rule clearly envisages that the discretion should only be exercised in circumstances where the court itself requires the presence of the detainee, for instance, where the court is satisfied that a detainee is a necessary witness to a criminal or civil matter before the court, or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case. In the latter case, the court must be satisfied on an application by the detainee, that there are valid reasons for the detainee to be personally present to argue his own case. From this view, it follows that *prima facie* the power to issue an order requiring the presence of a detained person is discretionary and that being so it shall be exercised judicially.

It is true as stated by the learned judge that *Karpal Singh (No. 2)* was concerned with the interpretation of r. 93 and not art. 5(2) but it is of assistance, in our view, in reading and interpreting art. 5(2). We have to bear in mind that even in a s. 8 situation the right of a detained person to be present at the *habeas corpus* proceeding is not a constitutional right but at the discretion of the court and hence for the learned judge to rule as being the constitutional right of the applicants to be present at their *habeas corpus* proceedings for an arrest under s. 73(1) of the ISA could not be supported. Section 73 cannot be divorced from s. 8 of the ISA. This is what Salleh Abas, LP said in *Tan Sri Raja Khalid bin Raja Harun, supra,* at p. 186:

> The arrest and detention under section 73(1) is pending inquiries to see if an order under section 8 should be made by the Minister. It is clear from the language of the two sections that section 73 provides for the initial detention and cannot be divorced from section 8 of the Act which provides for the final detention.

In another case similar as *Karpal Singh (No. 2),* the detained person applied for an order from the High Court for his appearance at his *habeas corpus* proceeding by urging the court to invoke r. 93(1) of the Internal Security (Detained Persons) Rules 1960. The High Court in spite of being aware of the Supreme Court case of *Karpal Singh (No. 2)* and also *Re Greene* [1941] 57 TLR 533 referred therein allowed the application and on appeal the Supreme Court set aside the order. The case is *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v. Lim Guan Eng* [1989] 1 CLJ 906 where it was held the principle is that where the issue of a writ of *habeas corpus* is sought it is not the practice to allow the presence of the person detained. We could not possibly disagree with what was said by the Supreme Court.

By way of persuasive authority, we refer to the Indian Supreme Court case of *Kanu Sanyal v. District Magistrate, Darjeeling & Ors.* AIR [1973] SC 2684. It is a case dealing with *habeas corpus* where in considering the need of a detained person to be produced in court at the time when issuing an order of his release Bhagwati, J, also dealt with whether there was the need of the detained person to be produced at the hearing itself at p. 2689 thus:

> The inquiry into the legality of the detention can be made and the person illegally detained can be effectively set free without requiring him to be produced before the court. Why then should it be necessary that the body of the person alleged to be wrongfully detained must be produced before the court before an application for a writ of *habeas corpus* can be decided by the court? Would it not mean blind adherence to form at the expense of substance?

We respectfully agree with what was expressed by Bhagwati, J.

Quite apart from the constitutional right point, even if the learned judge were minded to exercise his judicial discretion for the production of the applicants, with respect, on the record there was no sufficient material before him to exercise such a discretion.

We do appreciate the learned judge's concern, as the guardian of justice, on the constitutional right of a detained person especially under the ISA, a legislation that is presently the focus of public debate and concern but we have to be clear on the functions of the court. In this respect, suffice for us to quote what Raja Azlan Shah, FJ (as His Highness then was) said in *Loh Kooi Choon v. Government of Malaysia, supra* at p. 188:

> It is clear that the question at issue is fraught with political controversy. No doubt the appellant and other persons holding strong views one way or the other on the justice of the impugned Act. I should add that right now no feature of our system of government has caused so much discussion, received so much criticism, and been so frequently misunderstood, than the duties assigned to the courts and the functions which they discharge in guarding the Constitution. For that reason and also because it is rarely that this court is faced with a constitutional question of this kind it is desirable at the outset to make clear the functions of the courts.
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> The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher and Sons Ltd. v. London Society of Compositors* [1913] AC 107, 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

> It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' – per Roskill, L.J. in *Henry v. Geopresco International Ltd.* [1975] 2 All ER 702, 718. Those who find fault with the wisdom of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

For the reasons stated the learned judge, in our view, erred in interpreting art. 5(2) in relation to actions under the ISA as giving a constitutional right to the applicants to be present at their *habeas corpus* proceedings. We accordingly allowed the appeals and set aside the orders of the learned judge.